

EUROPEAN COMMISSION
HEALTH AND CONSUMERS DIRECTORATE-GENERAL

Acting Deputy Director General for the Food Chain

Brussels,
SANCO.E2/ICN/lav (2014) 383046

Dear Mr Button,

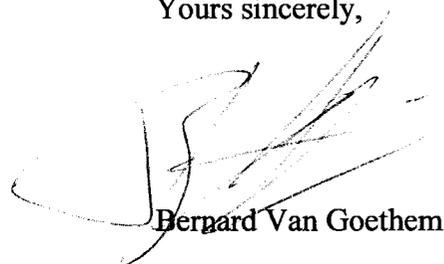
Subject: EU suggestions on UPOV documents on 'harvested material'

According to the procedure introduced on the occasion of the 26th ordinary session of the UPOV Council, please find, in the annexes I and II, the comments and suggestions from the European Union for modification on the following UPOV documents:

- CAJ-AG/13/8/3 - Explanatory Notes on Acts in Respect of Harvested Material;
- UPOV/EXN/HRV Draft 10 - Explanatory Notes on Acts in Respect of Harvested Material under the 1991 act of the UPOV Convention.

The suggestions for modifications are highlighted in yellow.

Yours sincerely,



Bernard Van Goethem

Enclosure: Annexes I (CAJ-AG/13/8/3) and II (UPOV/EXN/HRV Draft 10)

C.c: DDG.2: T. Gumbel
Dir. E: E. Poudelet, A. Cusimano
Unit E2: D. I. Simion, P. Mannerkorpi, I. Clément-Nissou
CPVO: M. Ekvad

Mr Peter Button
Vice Secretary General of UPOV
34 Chemin des Colombettes
CH-2111- Genève 20
Switzerland

Annex I (CAJ-AG/13/8/3)

General comments from EU and its Member States on the examples 1-10 (pages 7 to 18):

- * The figures shall indicate more clearly that the export of material takes place without the authorization of the right holder, except for the examples 8, 9 and 10;
- * Some examples are very similar (e.g. 1 and 2, 3 and 4, 5 and 6) and therefore can be merged;
- * Example 7 should only refer to variety 2 (in the figure) and to country E instead of country A (in the text);
- * It should be clarified that the term 'right holder' which could be the breeder, the employer, the successor in title, is a more general term to be used;
- * References to related articles of the UPOV 1991 act were introduced in the explanation part;
- * The specific proposals for modification of each example are highlighted in yellow in the document.

Comment from EU and its Member States on the examples 11 (page 18):

There is a need to clarify if this example relates to harvested material and exhaustion or to unauthorized use of propagating material. Therefore the EU and its Member States reserve their comments at this stage.

Comment from EU and its Member States on the 'reasonable opportunity' (page 19)

The EU and its Member States will come back later on the development of possible guidance element on "reasonable opportunity" for the right holder to exercise his/her right.



CAJ-AG/13/8/3
ORIGINAL:English
DATE:September 17, 2013

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
Geneva

ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP

Eighth Session
Geneva, October 25, 2013

EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL

Document prepared by the Office of the Union

Disclaimer: this document does not represent UPOV policies or guidance

1. The Council, at its forty-seventh ordinary session, to be held in Geneva on October 24, 2013, will be invited to adopt document UPOV/EXN/HRV/1 "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" on the basis of document UPOV/EXN/HRV Draft 10.
2. The CAJ, at its sixty-seventh session, held in Geneva, on March 21, 2013, agreed to invite the Administrative and Legal Committee Advisory Group (CAJ-AG) to immediately start work on a future possible revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" in order to include illustrative examples of situations where breeders might be considered to be able to exercise their rights in relation to harvested material. The CAJ further agreed to invite the CAJ-AG to consider the development of guidance on "reasonable opportunity" in relation to a possible revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" (see document CAJ/67/14 "Report on the Conclusions", paragraphs 13 and 14).
3. On the above basis, the purpose of this document is to present proposals concerning illustrative examples of situations where breeders might be considered to be able to exercise their rights in relation to harvested material and to consider the development of guidance on "reasonable opportunity".

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ILLUSTRATIVE EXAMPLES

Background

4. At its sixth session, held in Geneva on October 18, 2011, the CAJ-AG considered document UPOV/EXN/HRV Draft 6 "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention". With regard to Section (e) "Illustrative examples", the CAJ-AG noted that the illustrative examples could cause some confusion with regard to matters concerning unauthorized use of propagating material and matters concerning exhaustion. It agreed that the illustrative examples should be replaced by a general explanation of "unauthorized use of propagating material", on the basis of the cases provided in the illustrative Examples 1 to 8. The CAJ-AG noted that Example 9 did not make reference to unauthorized use of propagating material(see CAJ-AG/11/6/7 "Report", paragraph10).

5. The CAJ-AG, at its seventh session, held in Geneva on October 29 and 30, 2012, agreed that on the basis of the amendments agreed at the session, the Office of the Union should prepare a revised version of document UPOV/EXN/HRV Draft 8, to be considered by the CAJ at its sixty-seventh session, to be held in Geneva on March 21, 2013, and for subsequent adoption by the Council. The CAJ-AG further agreed to propose to the CAJ that the CAJ-AG be invited to immediately start work on illustrative examples for a future possible revision (see CAJ-AG/12/7/7 "Report", paragraph 78). As explained in the introduction to this document, the CAJ, at its sixty-seventh session, held in Geneva, March 21, 2013, agreed to invite the Administrative and Legal Committee Advisory Group (CAJ-AG) to immediately start work on a future possible revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" in order to include illustrative examples of situations where breeders might be considered to be able to exercise their rights in relation to harvested material.

Scope of the Breeder's Right

6. Article 14, paragraphs (1) and (2), of the 1991 Act of the UPOV Convention are reproduced here for ease of reference:

Article 14 of the **1991 Act** of the UPOV Convention

(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

[...]

Exhaustion

Article 16 of the UPOV Convention is reproduced here for ease of reference:

Article 16 of the 1991 Act: Exhaustion of the breeder's right

(1) [Exhaustion of right] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve further propagation of the variety in question or

(ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [Meaning of "material"] For the purposes of paragraph (1), "material" means, in relation to a variety,

(i) propagating material of any kind,

(ii) harvested material, including entire plants and parts of plants, and

(iii) any product made directly from the harvested material.

(3) ["Territory" in certain cases] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

Discussions that took place prior to the 1991 Diplomatic Conference

7. In order to assist the CAJ-AG in its consideration of the possibility of developing illustrative examples, the following extracts from the preparatory work for the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, held in Geneva from March 4 to 19, 1991 (1991 Diplomatic Conference) may be of assistance.

Extract from document CAJ/XXII/8

(Report of the twenty-second session of the Administrative and Legal Committee, held in Geneva from April 18 to 21, 1988)

Extract relates to the item "Revision of the Convention", "Article 5" and refers to document CAJ/XXII/6, a copy of which is posted on the UPOV website (see http://www.upov.int/meetings/en/details.jsp?meeting_id=29783)

59. Some delegations questioned the references to "material" and "derived material," as explained in paragraph 4 of the comments in the Office draft. One delegation suggested inserting the word "propagating" before the word "material" in paragraph (2)(a); it stated that it could not agree to extending protection to end-products and to giving an excessive right to the breeder if that gave rise to increases in prices and to a widening of the price differences between protected and non-protected products. On the other hand, it would agree to an extension of protection to products imported from countries without protection.

60. It was explained in that connection that the proposal was not to grant additional rights, but to enable the breeder to exercise his right once--and once only--on some material other than propagating material in the event of his having been unable to exercise it on the propagating material; there was therefore no question of increasing prices. The possibility of extending rights to imported products had been considered but rejected; there were also cases in domestic production activities in which the breeder was not able to assert his right at the level of the propagating material because information on its production and use was not readily available. One particular case was that of cell cultures used in the pharmaceutical industry. In addition, limitation to imported material would create different situations in terms of burden of proof and enforcement of the right, depending on the species and the production technique. The only solution possible was therefore a general extension of the right to the end-product combined with adequate provision for exhaustion of the right.

Extract from document CAJ/XXIII/7

(Report of the twenty-third session of the Administrative and Legal Committee, held in Geneva from October 11 to 14, 1988)

Extract relates to the item "Revision of the Convention", "Article 5" and refers to document CAJ/XXIII/2, a copy of which is posted on the UPOV website (see http://www.upov.int/meetings/en/details.jsp?meeting_id=29783)

56. Two examples were given to show why end products should be covered. The first example concerned cut flowers of a rose variety which were produced in a country where there was no protection for the variety and then imported into a country where the variety was protected. It was agreed that the breeder should have rights in respect of the cut flowers in the importing country, and therefore the term "material of the variety" should cover such cut flowers. The second example given concerned starch produced from a potato variety in a country where there was no protection for the variety, which was then imported into a country where the variety was protected. In relation to this example it was asked where protection would end. One delegation said that the starch could be used in the production of shirts, and the question arose as to whether breeders' rights should prevent the importation of the shirts. In relation to this question it was stated that it should be considered whether plant variety rights should be any less extensive than other intellectual property rights. The question of where to cut off the breeders' right was the same as that which arose in patent law in relation to the directly obtained product of a patented process. It was also stated that, in addition to considering the principle of extending protection, it was necessary also to consider the practicability of extension.

Extract from document CAJ/XXIV/6

(Report of the twenty-fourth session of the Administrative and Legal Committee, held in Geneva from April 10 to 13, 1989)

Extract relates to the item "Revision of the Convention", "Article 5" and refers to document CAJ/XXIV/2, a copy of which is posted on the UPOV website (see http://www.upov.int/meetings/en/details.jsp?meeting_id=29783)

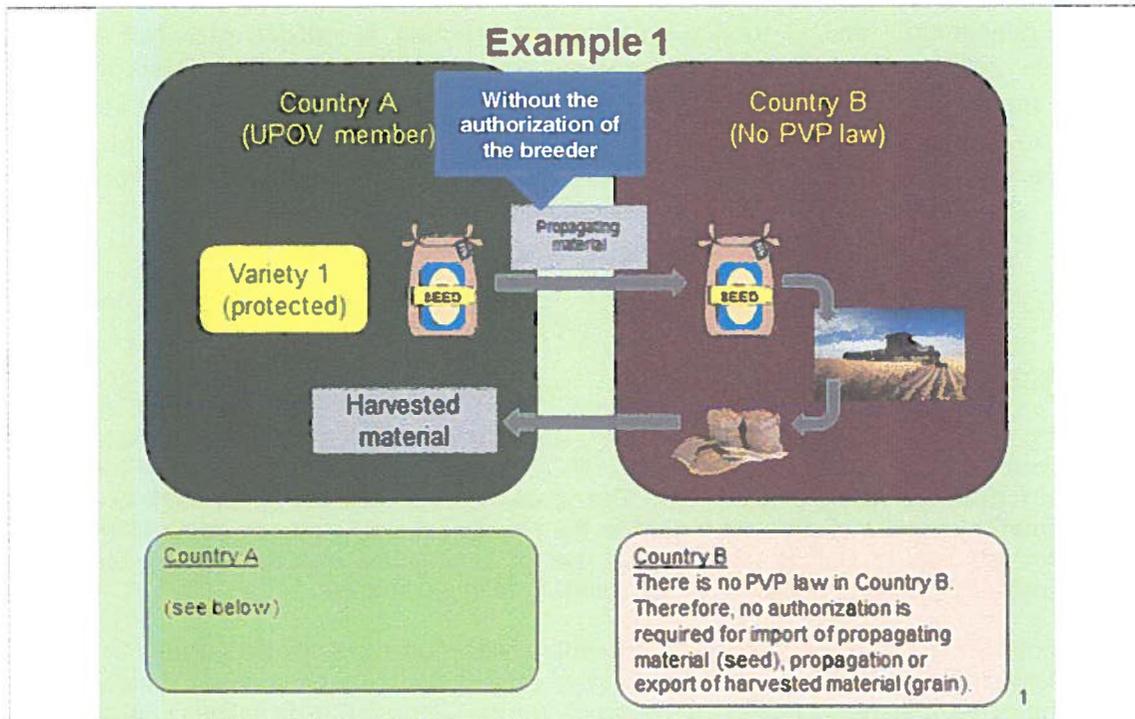
76. Paragraph (2)(i) [exhaustion of right].- A discussion ensued on the phrase "material which has been put on the market in the member State of the Union concerned," that is to say the question whether a breeder who had placed material on the market in one country should still have the possibility of exercising his right of prohibition in another country to oppose imports of the material into the latter country. That question was answered affirmatively in view of the nature, that is to say domestic, of the titles of protection issued and of the independence of protection afforded in the various member States. The proposed text was held to be satisfactory on that point.

Analysis of illustrative examples

8. In order to seek to clarify the issues concerning unauthorized use of propagating material and matters concerning exhaustion, the examples in document UPOV/EXN/HRV Draft 6, with two additional examples, are considered further in the following section. Examples 1 to 9 in this document have been graphically illustrated in order to improve clarity with regard to the situation in the territories and further explanations have been provided with regard to unauthorized use of propagating material and matters concerning exhaustion, in order to facilitate discussion on the suitability of the examples.

9. The alternative explanations are based on matters raised in previous discussions in the CAJ-AG, comments received and the discussions that took place prior to the 1991 Diplomatic Conference, based in particular on the extracts above. The purpose of preparing the alternative explanations is to seek to find an agreed explanation, but also to seek to ensure that reasons for rejecting an explanation are clearly understood on the basis of Articles 14 and 16 of the 1991 Act of the UPOV Convention.

Example 1



Country A

Possible explanations:

Alternative (a) Unauthorized export from country A

The right holder (breeder/employer/successor in title) of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the right holder breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material (Art 14(2)).

The plant breeder's right is not exhausted in Country A, because the following acts take place: there is

* export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes in country B" (see Art 16(1)(ii)), and

± "further propagation of the variety in question" (see Art 14(1)(i)) takes place from the propagating material in country B (no PVP law).

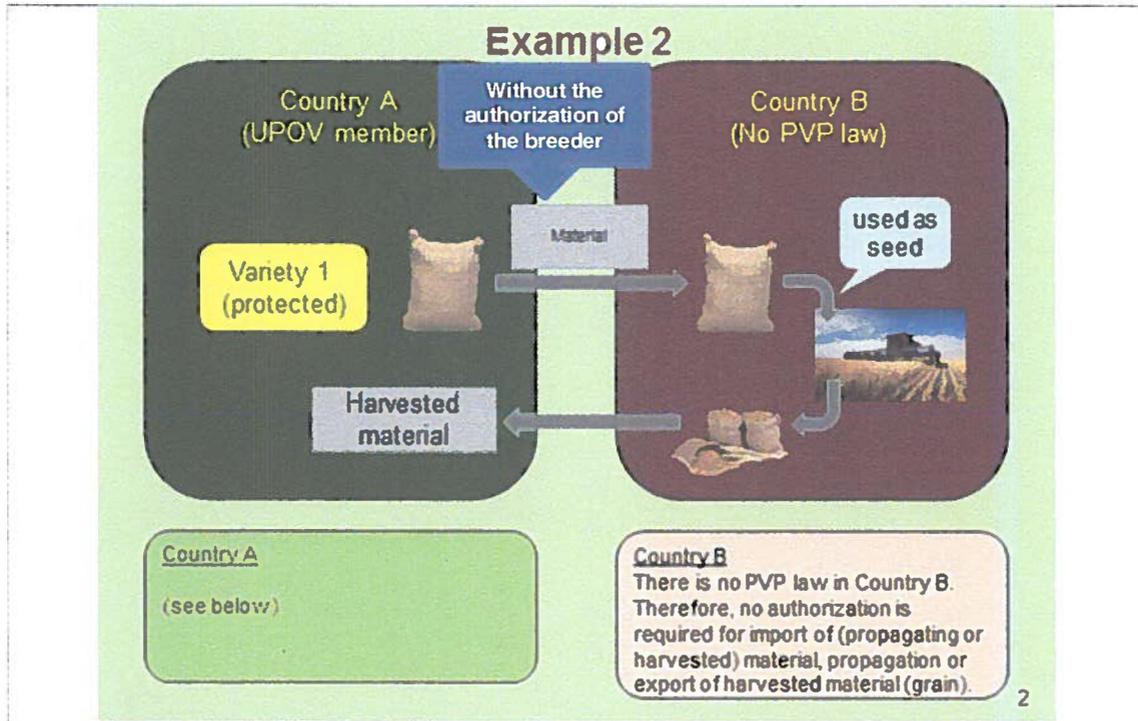
(Note: this alternative assumes that "further propagation" does not mean propagation that requires the authorization of the breeder, because authorization is not required in Country B.)

Alternative (b)

The breeder of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material.

The breeder's right is not exhausted in Country A, because there is "export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes".

Example 2



Country A

Possible explanations:

Alternative (a) Unauthorized export from country A

The right holder (breeder/employer/successor in title) of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of material that was used as propagating material and the right holder breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export (Art 14(2)).

The plant breeder's right is not exhausted in Country A, because the following acts take place: there is

*export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes in country B" (Art 16(1)(ii)), and

* "further propagation of the variety in question"(Art 14(1)(i))_ takes place in country B (no PVP Law) from the harvested material, used as propagating material.

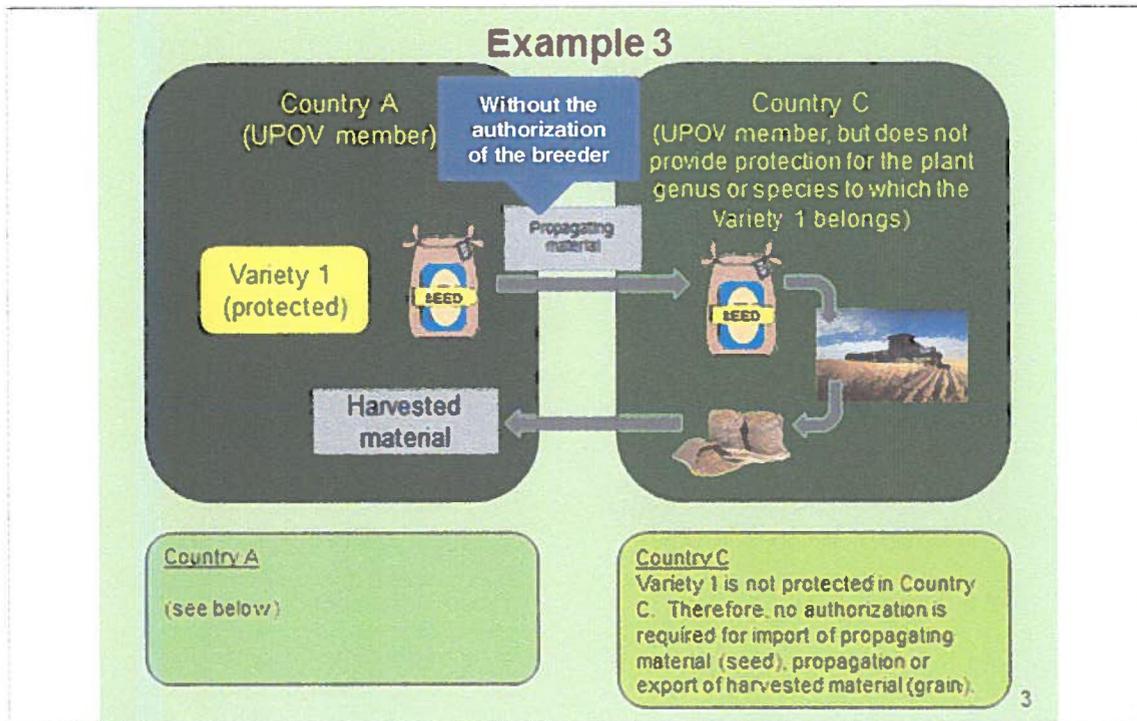
(Note: this alternative assumes that "further propagation" does not mean propagation that requires the authorization of the breeder, because authorization is not required in Country B.)

Alternative (b)

The breeder of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of material that was used as propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export.

The breeder's right is not exhausted in Country A, because there is "export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes".

Example 3



Country A

Possible explanations:

Alternative (a) Unauthorized export from country A

The right holder (breeder/employer/successor in title) of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the breeder right holder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material (Art 14(2)).

The plant breeder's right is not exhausted in Country A, because the following acts take place:

* export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes in country C" (Art 16(1)(ii)), and

± "further propagation of the variety in question"(Art 14(1)(i) takes place from the propagating material in country C.

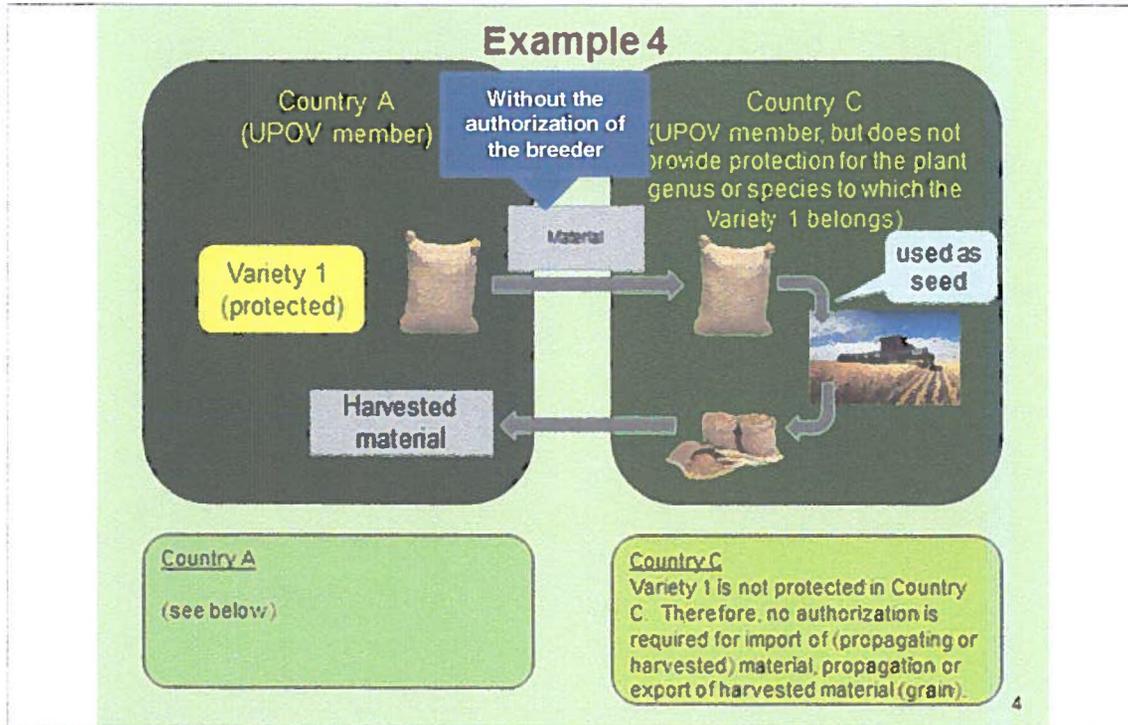
(Note: this alternative assumes that "further propagation" does not mean propagation that requires the authorization of the breeder, because authorization is not required in Country C.)

Alternative (b)

The breeder of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material.

The breeder's right is not exhausted in Country A, because there is "export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes".

Example 4



Country A

Possible explanations:

~~Alternative (a) Unauthorized export from country A~~

The right holder (breeder/employer/successor in title) of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of material that was used as propagating material and the right holder breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export (Art 14(2)).

The plant breeder's right is not exhausted in Country A, because the following acts take place: there is

*export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes in country C" (Art 16(1)(ii)), and

* "further propagation of the variety in question"(Art 14(1)(i)) takes place in country C from the harvested material, used as propagating material.

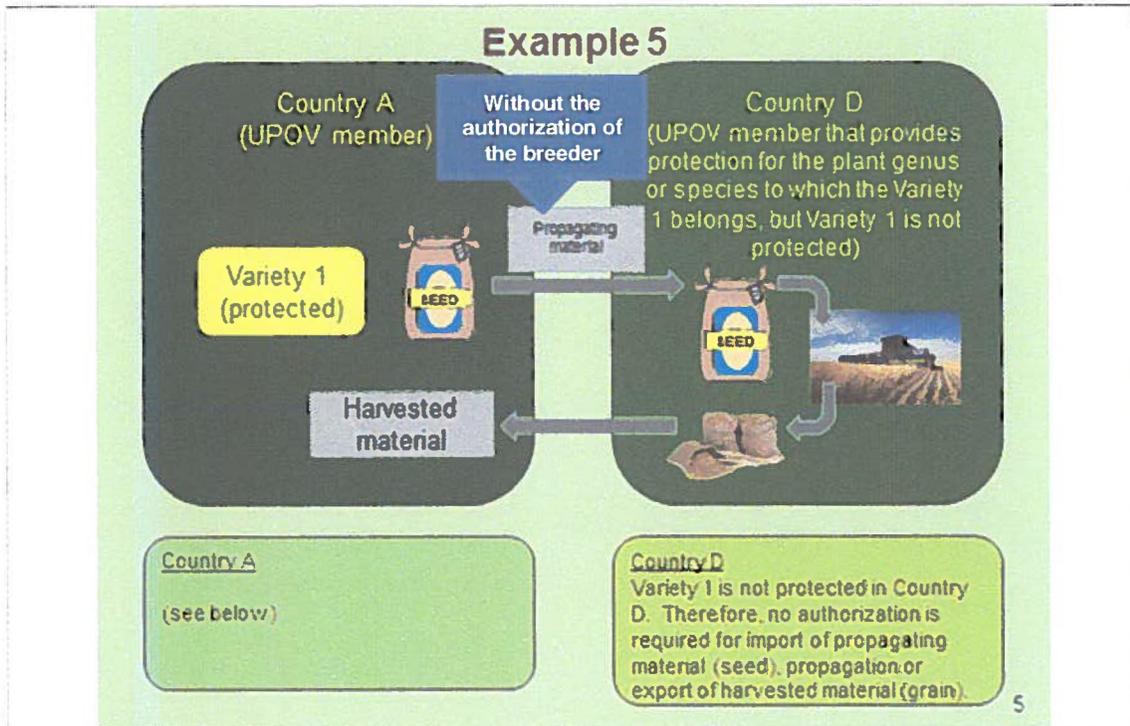
~~(Note: this alternative assumes that "further propagation" does not mean propagation that requires the authorization of the breeder, because authorization is not required in Country C.)~~

~~Alternative (b)~~

The breeder of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of material that was used as propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export.

The breeder's right is not exhausted in Country A, because there is "export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes".

Example 5



Country A

Possible explanations:

Alternative (a) Unauthorized export from country A

It is up to the right holder to determine if he/she wants or not to protect his/her variety in country D. Nevertheless, the right holder (breeder/employer/successor in title) of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the right holder breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material (Art 14(2)).

The plant breeder's right is not exhausted in Country A, because there is "further propagation of the variety in question" in country D (Art 16(1)(i)).

(Note: this alternative assumes that "further propagation" does not mean propagation that requires the authorization of the breeder, because authorization is not required in Country D.)

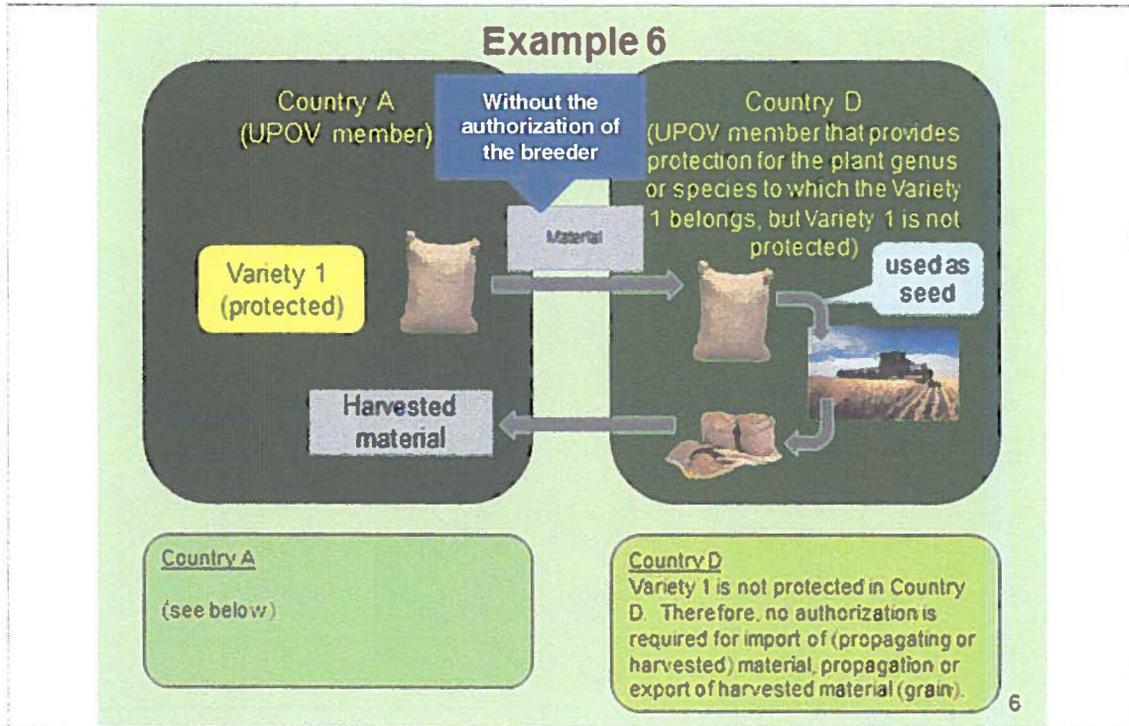
Alternative (b)

The breeder of Variety 1 cannot exercise the right on the imported harvested material because the right is exhausted.

(Note: this alternative assumes that there is exhaustion of the right because there is no "export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes" and assumes that that "further propagation" means propagation that requires the authorization of the breeder, because authorization is not required in Country D.)

(In previous discussions in the CAJ-AG, it was noted that such an explanation implied that there would be less protection for breeders in Country A if harvested material originated from a non-UPOV member with no PVP law compared to a non-UPOV member with no PVP law, for the same situation, and concluded that such a situation would not have been the intention of the Convention.)

Example 6



Country A

Possible explanations:

Alternative (a) Unauthorized export from country A

It is up to the right holder to determine if he/she want or not to protect his/her variety in country D. Nevertheless, the right holder (breeder/employer/successor in title) of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export (use) of material that was used as propagating material and the breeder-right holder did not have a reasonable opportunity in Country A to exercise the right in relation to the export (Art 14(2)).

The plant breeder's right is not exhausted in Country A, because there is "further propagation of the variety in question" in country D (Art 16(1)(i)).

(Note: this alternative assumes that "further propagation" does not mean propagation that requires the authorization of the breeder, because authorization is not required in Country D.)

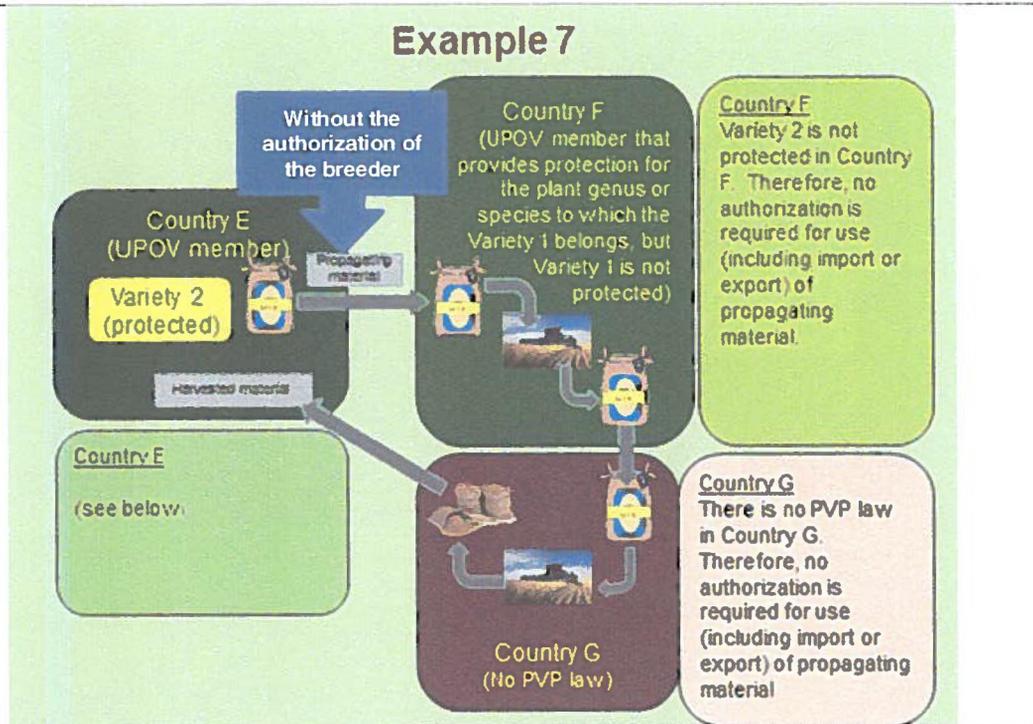
Alternative (b)

The breeder of Variety 1 cannot exercise the right on the imported harvested material because the right is exhausted.

(Note: this alternative assumes that there is exhaustion because there is no "export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes" and assumes that that "further propagation" means propagation that requires the authorization of the breeder, because authorization is not required in Country D.

In previous discussions in the CAJ-AG, it was noted that such an explanation implied that there would be less protection for breeders in Country A if harvested material originated from a non-UPOV member with no PVP law compared to a non-UPOV member, with no PVP law for the same situation, and concluded that such a situation would not have been the intention of the Convention.)

Example 7



Country E

Comment: there are some Mistakes in the drawing and the text:

** variety 2 should be everywhere;*

** in the text for Alternative b) a reference is made to country A where it should be country E.*

Possible explanations:

Alternative (a) Unauthorized export of variety 2 from country E:

The right holder (breeder/employer/successor in title) of Variety 2 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the right holder breeder did not have a reasonable opportunity in Country E to exercise the right in relation to the export of propagating material (Art 14(2)).

The plant breeder's right is not exhausted in Country E, because

* there is "further propagation of the variety in question" in countries F and/or G (Art 16(1)(i)), and..

* export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes in country G" (Art 16(1)(ii))

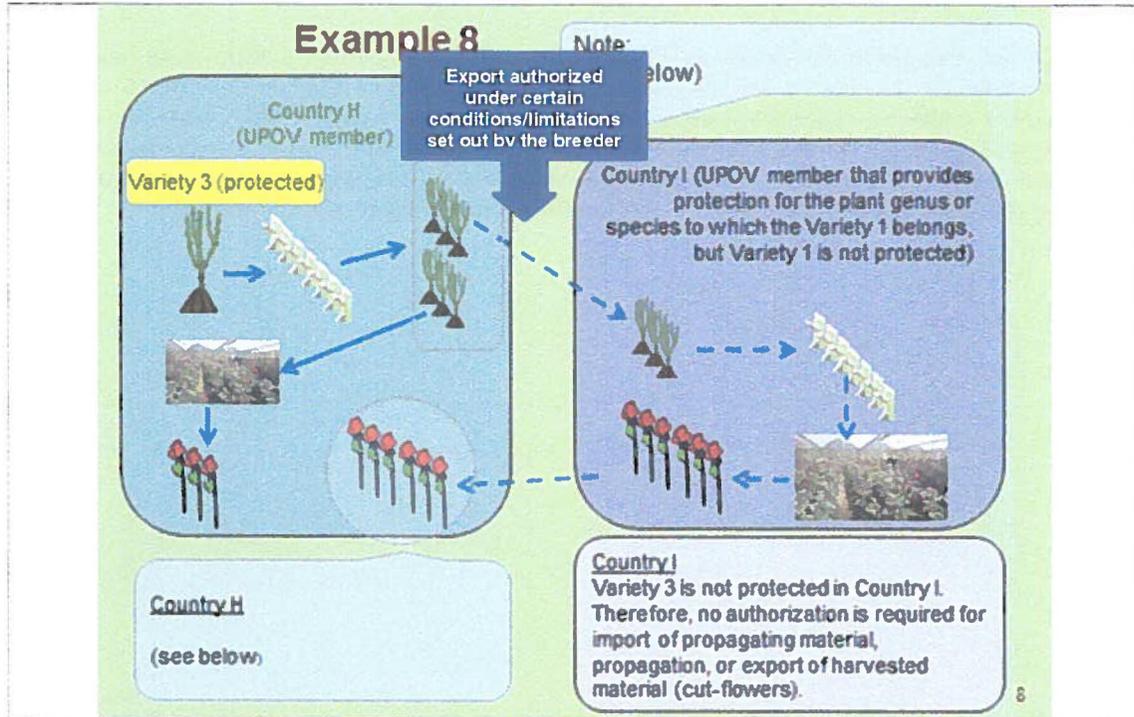
(Note: this alternative assumes that "further propagation" does not mean propagation that requires the authorization of the breeder, because authorization is not required in Country F.)

Alternative (b)

The breeder of Variety 2 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material.

The breeder's right is not exhausted in Country E, because there is "export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes".

Example 8 (CIOPORA proposed to delete this example)



(Note: The right holder (breeder/employer/successor in title) of variety 3 authorizes a propagator in Country H to produce 50,000 plants for sale for cut-flower production. The propagator produces 50,000 plants, which are sold to a grower in Country H. The grower in Country H plants 25,000 plants, but sells 25,000 plants to a grower in Country I (for cut-flower production), where variety 3 is not protected. However, the grower in Country I uses the 25,000 plants to propagate further plants of variety 3.)

Comment: The drawing needs to be clarified in relation to country I in order to show further propagation (from 3 plants we obtain 6 sets of propagating material and then 6 plants, before the greenhouse)

Country H

Possible explanations:

Alternative (a) Breach of contract:

The right holder (breeder/employer/successor in title) of Variety 3 can exercise the right on the imported harvested material (e.g. cut flower) if there was unauthorized export (use) of propagating material used to further propagate the variety (whereas the export was authorized only to produce cut flowers) and the right holder breeder did not have a reasonable opportunity in Country H to exercise the right in relation to the export of propagating material. (Art 14(2)).

The plant breeder's right is not exhausted in Country H, because there is "further propagation of the variety in question" in country I. (Art 16(1)(i))

Note: In the EU, to prevent exhaustion of a plant breeder's right, the breach of contract (no respect of the conditions and limitations set out in the licensing contract with the breeder) must relate to an essential aspect of the plant breeder's right (e.g. CJEU court case C-140/10). Further propagation is considered to be an essential element of the plant breeder's right. Therefore further propagation (to propagate more than the terms of the contract) will not result in the exhaustion of the plant breeder's right.

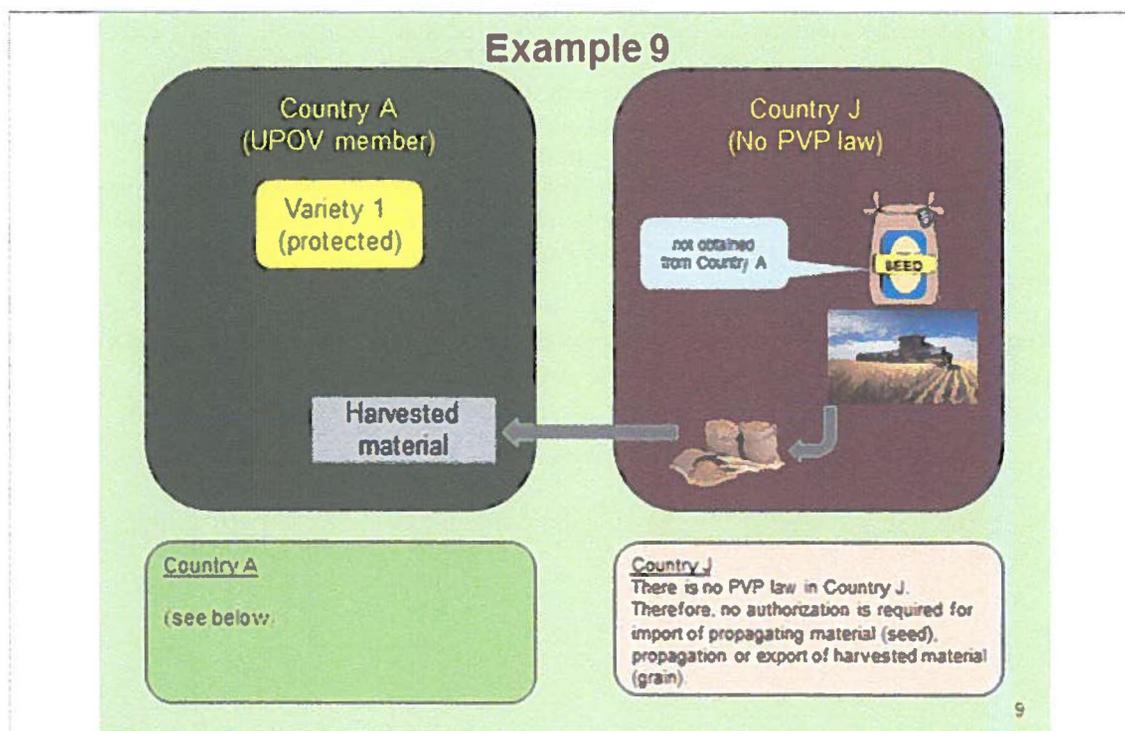
(Note: this alternative assumes that "further propagation" does not mean propagation that requires the authorization of the breeder, because authorization is not required in Country I.)

Alternative (b)

~~The breeder of Variety 3 cannot exercise the right on the imported harvested material because the right is exhausted.~~

~~(Note: this alternative assumes that there is exhaustion because there is no "export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes" and assumes that that "further propagation" means propagation that requires the authorization of the breeder, because authorization is not required in Country I.)~~

Example 9

Country A

Possible explanations:

Alternative (a)

The variety 1 is protected in country A but not grown in country A (e.g. not adapted to the climatic conditions). The variety 1 is grown in country J where there is no PVP law.

The right holder (breeder/employer/successor in title) of Variety 1 can exercise the right on the imported harvested material taking into account the fact that if the right holder breeder did not have a reasonable opportunity in Country A to exercise the right in relation to propagating material. It must have been an unauthorized use of the propagating material of variety 1.

- 3 options:

- (a) Propagating material and breach of contract: The right holder from country A provides the variety 1 to a third party in any country (license agreement preventing export), then the material goes, without being authorized, to country J where the variety is further propagated; it corresponds to a situation of breach of contract where an essential element of the plant breeder's right is not respected, i.e. further propagation with unauthorized use. Therefore there is no exhaustion of the plant breeder's right. Consequently the right holder can exercise his/her right against the import of the material in country A (Art 16(1)(i));
- (b) No contract and harvested material/products: the right holder finds in country A harvested material (e.g. cut flower) imported by someone other than the breeder/holder; the harvested material corresponds to material for which he/she has not given authorization through a license agreement. Therefore there is no exhaustion of right and the right holder can exercise his/her right against the import of the material in country A.(Art 14(2) and Art 16(1)(ii)). The breeder's right is not exhausted in Country A, because it is the first opportunity to exercise the right.
- (c) Case of variety 1 present in country J before the protection is granted in country A (the use of the material in country J is legal) or case of independent breeding resulting in a non-distinct variety: The breeder's right is not exhausted in Country A because the import of harvested material in country A from country J is the first opportunity for the right holder to exercise his/her right.

(Note: this alternative is based on the extracts from the preparatory work for the 1991 Diplomatic Conference (see paragraph 7 of this document), which indicated a wish to

- extend protection to “products imported from countries without protection” and to “enable the breeder to exercise his right once – and only once – on some material other than propagating material” (see document CAJ/XXII/8)
- provide rights in respect of cut flowers “produced in a country where there was no protection for the variety and then imported into a country where the variety was protected” (see document CAJ/XXIII/7))

Alternative (b)

~~The breeder of Variety 3 cannot exercise the right on the imported harvested material because there was no unauthorized use of propagating material.~~

Example 10

Variety 4 is protected in Country K. In Country K, there is an exception under Article 15(2) of the 1991 Act, but that exception is not applicable for the species to which variety 4 belongs. A farmer uses some of the harvested material of variety 4 for propagating purposes on his own holding without the authorization of the breeder.

Explanation

We are under the optional exception provided in Art 15(2) and not under Art 15(1). The breeder of Variety 4 can exercise the right on the harvested material if the breeder did not have a reasonable opportunity to exercise the right in relation to the propagating material. (Art 14.2)

The breeder's right is not exhausted because there is "further propagation of the variety in question". (Art 16(2) (i)).

Example 11

Variety 5 is protected in Country L. In Country L, an exception under Article 15(2) of the 1991 Act is applicable for variety 5, with a limit on the amount of the harvested material which the farmer is allowed to use for propagating purposes. The farmer uses more than the permitted amount for propagating purposes on his own holding without the authorization of the breeder.

Explanation

The breeder of Variety 5 can exercise the right on the harvested material if the breeder did not have a reasonable opportunity to exercise the right in relation to the propagating material.

The breeder's right is not exhausted because there is "further propagation of the variety in question".

10. *The CAJ-AG is invited to consider Examples 1 to 11 and the possible explanations in relation to the ability of the breeder to exercise the right in relation to harvested material.*

REASONABLE OPPORTUNITY

Background

11. The Council, at its forty-seventh ordinary session, to be held in Geneva on October 24, 2013, will be invited to adopt document UPOV/EXN/HRV/1 "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" on the basis of document UPOV/EXN/HRV Draft 10.

12. The CAJ, at its sixty-seventh session, held in Geneva, March 21, 2013, agreed to invite the CAJ-AG to consider the development of guidance on "reasonable opportunity" in relation to a possible revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" (see document CAJ/67/14 "Report on the Conclusions", paragraph 14).

13. The only text that has been considered by the CAJ-AG in relation to an elaboration of the term "reasonable opportunity" was the following (see document UPOV/EXN/HRV Draft 8, paragraph 13):

"It is a matter for each member of the Union to determine what constitutes 'reasonable opportunity' to exercise his right."

However, the CAJ-AG, at its seventh session, held in Geneva on October 29 and 30, 2012, agreed that the above text should be deleted (see document CAJ-AG/12/7/7 "Report", paragraph 76).

Development of guidance

14. In the absence of previous proposals and discussion on the matter of "reasonable opportunity", it is proposed that members of the Union and observer organizations representing breeders be invited to submit proposals for guidance on the matter.

15. The CAJ-AG is invited to propose to the CAJ to invite members of the Union and observer organizations representing breeders to submit proposals for guidance on the matter.

[End of document]

[Annex II of comments follows]

Comment of the EU and its Member States on paragraph 4:

Taking into account the analysis of the various examples provided in the UPOV draft document CAJ-AG/13/8/3, the EU and its Member States consider that the paragraph 4 of the document UPOV/EXN/HRV could be revised in order to indicate that *unauthorized acts by the right holder (the breeder/the employer/the successor in title) can occur in the territory of the member of the Union where a breeder's right has been granted and is in force, as well as in other territory if there is (i) further propagation, or (ii) export of the material which enables the propagation of the variety into a country where there is no protection for the genera and species to which the variety belongs, except where the exported material is for final consumption. [See Art 16(1) of UPOV 1991 Act]. The right holder (the breeder/the employer/the successor in title) can enforce his/her right in the territory of the member of the Union where a breeder's right has been granted and is in force, against unauthorized acts which occurred elsewhere.*

(see additional text highlighted in yellow page 4).

Comment of the EU and its Member States on paragraph 5 (page 5):

The EU and its Member States consider that the current reference to Art 15 and 16 is broad and already includes a reference to in Art 16(1)(ii). Therefore there is no need to change the text.

Comment of the EU and its Member States on paragraph 6

Article 16(1)(ii) of the UPOV 1991 Act focuses on exports of material, including harvested material which can also include product that can be used as propagating material. It could also result in an unauthorized act; whereas, if the harvested material is used for final consumption, exhaustion of plant breeder's right occurs. Finally, in normal situations, final consumption doesn't take place in relation to the propagating material itself.

Therefore the EU and its Member States propose to modify the text in order to reflect the UPOV text, which means to delete the word 'propagating' and to add between bracket that material can be 'propagating material, harvested material and any product made directly from the harvested material'. (see text highlighted in yellow page 5).

Comment of the EU and its Member States on paragraphs 7 and 8:

It was proposed to exclude law-abiding farmer having purchased the propagating material from the licensee, which did not respect the conditions and limitations made by the breeder.

The analysis of court case by the Court of Justice of the EU (C-140/10), where there was a situation of breach of contract by the person which signed the license agreement with the breeder, concluded that the farmer using material resulting from this licensee is also an infringer even if there is no breach of contract by the farmer (he was not part of the contract). The infringement of an intellectual property right is also linked to non-contractual responsibility (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)). The activity of the individual (here the farmer) who purchases (even law-abiding) propagating material from the licensee, which did not respect the conditions and limitations made by the breeder, and produces is an offence to the plant breeder's right. According to the decision, subjective elements, such as awareness of the conditions or limitations imposed in the licensing contract, do not in principle play any role in the assessment of an infringement of an intellectual property right or of the right to bring an action against the person (in this case, the farmer) who committed that infringement.

Therefore, taking into consideration the court case C140/10, the EU and its Member States propose to add a sentence in paragraph 8 (see additional text highlighted in yellow page 5): *The infringement of a plant breeder's right shall also be linked to non-contractual responsibility. The activity of an individual who purchases and produces propagating material from the licensee, in breach of the conditions and limitations made by the right holder (the breeder/the employer/the successor in title), is considered as an offence to the plant breeder's right.*



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Geneva

DRAFT

EXPLANATORY NOTES ON
ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION

Document prepared by the Office of the Union

to be considered by

*the Administrative and Legal Committee at its sixty-eighth session,
to be held in Geneva on October 21, 2013*

and

*the Council at its forty-seventh ordinary session,
to be held in Geneva on October 24, 2013*

Disclaimer: this document does not represent UPOV policies or guidance

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EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION

PREAMBLE

The purpose of these Explanatory Notes is to provide guidance on the scope of the breeder's right concerning acts in respect of harvested material (Article 14(2) of the 1991 Act) under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

ACTS IN RESPECT OF HARVESTED MATERIAL

(a) Relevant article**Article 14** of the **1991 Act** of the UPOV Convention

(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

[...]

1. Article 14(2) of the 1991 Act requires that, in order for the breeder's right to extend to acts in respect of harvested material, the harvested material must have been obtained through the **unauthorized use** of propagating material **and** that the breeder must not have had **reasonable opportunity** to exercise his right in relation to the said propagating material. The following paragraphs provide guidance in relation to "unauthorized use" and "reasonable opportunity".

(b) Harvested material

2. The UPOV Convention does not provide a definition of harvested material. However, Article 14(2) of the 1991 Act refers to "[...] harvested material, *including entire plants and parts of plants*, obtained through the unauthorized use of propagating material of the protected variety [...]", thereby indicating that harvested material includes entire plants and parts of plants obtained through the use of propagating material.

3. The explanation that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material.

(c) Unauthorized use of propagating material*Acts in respect of propagating material*

4. "Unauthorized use" refers to the acts in respect of the propagating material that require the authorization of the holder of the breeder's right in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. Thus, unauthorized acts **by the right holder (the breeder/the employer/the successor in title)** can **only** occur in the territory of the member of the Union where a breeder's right has been granted and is in force, **as well as in other territory if there is (i) further propagation, or (ii) export of the material which enables the propagation of the variety into a country where there is no protection for the genera and species to which the variety belongs, except where the exported material is for final consumption. [See Art 16(1) of UPOV 1991 Act]**

The right holder (the breeder/the employer/the successor in title) can enforce his/her right in the territory of the member of the Union where a breeder's right has been granted and is in force, against unauthorized acts which occurred elsewhere.

5. With regard to “unauthorized use”, Article 14(1)(a) of the 1991 Act of the UPOV Convention states that “Subject to Articles 15 [Exceptions to the Breeder’s Right] and 16 [Exhaustion of the Breeder’s Right], the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

Thus, subject to Articles 15 and 16, “unauthorized use” refers to the acts listed in (i) to (vii) above in respect of propagating material in the territory concerned, where such authorization was not obtained.

6. For example, in the territory of a member of the Union where a breeder's right has been granted and is in force, unauthorized export of propagating material (propagating material, harvested material and any product made directly from the harvested material – see Art 16 (1)(ii) and Art 16 (2) of UPOV 1991 Act), which enables the propagation of the variety, would be an unauthorized act.

Conditions and limitations

7. Article 14(1)(b) of the 1991 Act of the UPOV Convention further states that “[t]he breeder may make his authorization subject to conditions and limitations”. Thus, subject to Articles 15 and 16, “unauthorized use” also refers to the acts listed in Article 14(1)(a) (i) to (vii) that are not undertaken in accordance with the conditions and limitations established by the breeder.

8. Document UPOV/EXN/CAL “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention”, provides guidance concerning the conditions and limitations to which the breeder’s authorization may be subject, for acts in respect of propagating material under the UPOV Convention.

The infringement of a plant breeder's right shall also be linked to non-contractual responsibility. The activity of an individual who purchases and produces propagating material from the licensee, in breach of the conditions and limitations made by the right holder (the breeder/the employer/the successor in title), is considered as an offence to the plant breeder's right.

Compulsory exceptions to the breeder's right

9. Document UPOV/EXN/EXC “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention”, Section I “Compulsory Exceptions to the Breeder’s Right”, provides guidance on the provisions for the compulsory exceptions to the breeder’s right provided in Article 15 (1) of the 1991 Act of the UPOV Convention. “Unauthorized use” would not refer to acts covered by Article 15 (1) of the 1991 Act of the UPOV Convention.

Optional exception to the breeder's right

10. Article 15(2) of the 1991 Act of the UPOV Convention [Optional exception] states that “Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder’s right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii)”. Document UPOV/EXN/EXC “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention”, Section II “The Optional Exception to the Breeder’s Right”, provides guidance on the optional exception provided in Article 15 (2) of the 1991 Act of the UPOV Convention.

11. Where a member of the Union decides to incorporate this optional exception into its legislation, “unauthorized use” would not refer to acts that were covered by the optional exception. However, subject to Articles 15(1) and 16, “unauthorized use” would refer to acts that were included in the scope of the breeder’s right and were not covered by the optional exception in the legislation of the member of the Union

concerned. In particular, “unauthorized use” would refer to acts that did not comply with the reasonable limits and the safeguarding of the legitimate interests of the breeder provided in the optional exception.

(d) Reasonable opportunity to exercise his right

12. The provisions under Article 14(2) of the 1991 Act mean that breeders can only exercise their rights in relation to the harvested material if they have not had a “reasonable opportunity” to exercise their rights in relation to the propagating material.

13. The term “his right”, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory concerned (see paragraph 4 above): a breeder can only exercise his right in that territory. Thus, “exercise his right” in relation to the propagating material means to exercise his right in relation to the propagating material *in the territory concerned*.

[End of document]

